STATE OF MICHIGAN

COURT OF APPEALS

DAVID BARBER,

Plaintiff-Appellant,

v

JOHNNIE COLEMAN,

Defendant-Appellee.

UNPUBLISHED
January 4, 2007

No. 262733
Genesee Circuit Court
LC No. 04-080417-NZ

Before: White, P.J, and Zahra and Kelly, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an order granting defendant's motion to set aside a default. We vacate and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff is a radio personality at a Flint station. Defendant was, at the time the instant suit was filed, a member of the Flint City Council. Plaintiff filed suit alleging that defendant, without privilege, defamed him by making untrue statements to a reporter. The statements were later reported in the *Flint Journal*. The complaint also alleged intentional infliction of emotional distress, tortious interference with contractual relations, and gross negligence.

Defendant was served with the complaint and summons on December 22, 2004. A timely answer was not filed, and a default was entered on January 13, 2005.

MCR 2.603(D)(1) provides:

> A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

Good cause may be established by showing: (1) a procedural irregularity or defect, or (2) a reasonable excuse for not complying with the requirement that created the default. *Barclay v Crown Bldg & Dev, Inc*, 241 Mich App 639, 657; 617 NW2d 373 (2000).

In response to the default, defendant filed a "verified motion" to set the default aside. In the motion, defendant represented:

> 2. Upon receipt of the complaint, Johnnie Coleman turned the matter over to the Chief Legal Officer of the City of Flint and the Chief Legal Officer held on to the Complaint for several days before returning it to Mr. Coleman and advising him that the City would not represent him;
>
> 3. On January 10, 2005, Johnnie Coleman asked Attorney John Schlinker to represent him as Mr. Coleman was acting in his official capacity as President of the Flint City Counsel;
>
> 4. On January 10, 2005, Attorney John Schlinker asked Mr. Coleman when he had been served with the complaint and Mr. Coleman advised attorney Schlinker that to the best of his knowledge, he had been served at the time stamped on the front of the summons: "Received- Flint City Council 05 Jan -5 PM 2:49" (attached as Exhibit A- relevant time-stamp highlighted)….

The supporting brief argued that defendant's statements were absolutely privileged and that therefore, a meritorious defense existed. The brief also urged that the City Attorney had abandoned defendant, and that that constituted good cause to set aside the default.

Plaintiff countered with an affidavit from the process server stating that defendant had been served, consistent with the return of service filed in circuit court, on December 22, 2004. Plaintiff's counsel also filed an affidavit from the City Attorney, who stated, under oath, that defendant gave her the summons and complaint "prior to December 24, 2004" and that she advised defendant "on the week of December 27, 2004" that the City would not represent him and that he should seek other counsel.

At a hearing on defendant's motion, defense counsel said that he and defendant had miscommunicated about the date of service, and that defendant had just then clarified that while the summons was stamped January 5, 2005, he had in fact been served on December 22, 2004. Counsel admitted that he had had the summons and complaint on January 10, 2005, which would have permitted him to file a timely answer, but contended that the date stamped on the summons, January 5, 2005, led counsel to believe that he had additional time to file an answer.

The circuit court ruled that because defendant had earnestly sought counsel and was not purposely dilatory, there was sufficient good cause to set the default aside. Recognizing that no affidavit to support a meritorious defense was filed, the circuit court concluded that the "verified" motion was sufficient and stated a meritorious defense. The circuit court went on to recognize potential malpractice in defense counsel's conduct of the case, cautioning counsel to be more careful in the future.

We review a trial court's decision on a motion to set aside a default for an abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). An abuse of discretion occurs when the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Id.* (Citations omitted).

We vacate the court's order setting aside the default. The court's finding of good cause was not an abuse of discretion. The court was in a position to judge whether there was good-faith confusion caused by the time stamp, or fraud and dissembling. We defer to the court's judgment in this regard.

However, the circuit court erred by allowing the "verified" pleading to substitute for an affidavit of merit. In *Miller v Rondeau*, 174 Mich App 483, 487; 436 NW2d 393 (1988), this Court ruled that the difference between a "verified" pleading, authorized by MCR 2.114(B)(2)[1], and an affidavit was too important to allow one form to substitute for the other. The *Miller* Court noted that a "verified" claim could be made by merely asserting that a statement was true and accurate to the best of the signer's knowledge, information, and belief. An affidavit, on the other hand, required a sworn statement that facts asserted were made with personal knowledge, stating with particularity facts admissible as evidence establishing the grounds stated in the motion, and affirmatively showing that the affiant, if called to testify, could competently testify as to the matters set forth in the affidavit. MCR 2.119(B)(1).

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly

[1] The court rule is mistakenly cited as MCR(A)(2)(b) in *Miller, supra.*